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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAUL L. MONK,

Defendant and Appellant.

B190887

(Los Angeles County
Super. Ct. No. MA026337)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Jamaul L. Monk of first degree attempted murder. The trial court refused his request to instruct the jury on attempted voluntary manslaughter, which refusal Monk contends on appeal was reversible error. We disagree, and we therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On the morning of February 17, 2003, Darryl Bell was walking to a friend's house with his brother. Bell was not carrying weapons. A group of men,¹ one of whom was Jamaul Monk, drove up in a car. The men got out of the car. They were members of the 2-1 gang; Bell was a member of a rival gang, B.I.G. Bell and the men argued about their gangs, and Bell said "fuck," to one of the men. Monk shot Bell multiple times. As a result of his gunshot wounds, Bell was paralyzed from the neck down.

While he was in the hospital, unable to speak, he mouthed to his sister, who was able to read his lips, that Monk shot him. About three weeks after the shooting, while Bell was in the hospital, Detective Brian Dow showed him a photographic six-pack from which Bell identified Monk. Bell also identified Monk as the shooter at trial. Bell and Monk had gone to juvenile camp together.

II. Procedural background.

Monk was first tried by a jury in September 2004. The jury deadlocked, and the trial court declared a mistrial. A year later, a second jury tried Monk. On September 23, 2005, the jury found Monk guilty of willful, deliberate, and premeditated attempted murder. (Pen. Code,² §§ 187, subd. (a), 664, subd. (a).) The jury also found true

¹ Bell's testimony regarding how many men there were varied. He testified that there were four men, and five-to-seven men. On the morning of the shooting, Robert Hargroder was hanging laundry when he heard a loud noise. Four Black men ran by. He could not identify anyone.

² All further undesignated statutory references are to the Penal Code.

personal gun use allegations under sections 12022.53, subdivisions (b), (c), and (d). On April 5, 2006, the trial court sentenced Monk to life plus a consecutive 25-year-to-life term under section 12022.53, subdivision (d).

DISCUSSION

I. The trial court properly refused to instruct the jury on attempted voluntary manslaughter.

Monk's defense counsel asked the trial court to instruct the jury on attempted voluntary manslaughter. The trial court found that there was insufficient evidence to support such an instruction and refused to give it. We hold that the trial court properly refused to instruct the jury on attempted voluntary manslaughter.

A trial court has a sua sponte duty to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 162.) "Substantial evidence" is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on other grounds in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) It is evidence "sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) But any evidence, no matter how weak, will not give rise to a sua sponte duty to instruct on a lesser included offense. (*Flannel*, at p. 684, fn. 12.) "[S]peculation is not evidence, less still substantial evidence." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Thus, the trial court properly refuses to instruct on a lesser included offense when there is insufficient evidence to support the instruction. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Voluntary manslaughter is the intentional but nonmalicious killing of a human being. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583; *People v. Rios* (2000) 23 Cal.4th 450, 454, 463 & fn. 10; § 192.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Attempted voluntary

manslaughter is a lesser included offense of attempted murder. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708-709; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550.) The crime of attempted voluntary manslaughter, like attempted murder, requires proof of the intent to kill. (*Montes*, at pp. 1546-1552.) However, unlike attempted murder, attempted voluntary manslaughter requires no malice. (*Id.* at p. 1548.)

A killing may be reduced from murder to voluntary manslaughter if it occurs without malice “upon a sudden quarrel or heat of passion.” (§ 192, subd. (a); see also *People v. Manriquez*, *supra*, 37 Cal.4th at p. 583.) To reduce the crime to voluntary manslaughter, the provocation that incites the killer to act must be caused by the victim or reasonably believed by the accused to have been engaged in by the victim. The provocative conduct may be physical or verbal. However, it must be such as to have caused the defendant to be aroused and also would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Manriquez*, at pp. 583-584; *People v. Breverman*, *supra*, 19 Cal.4th at p. 163; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1311.)

There is insufficient evidence here that the attempted murder occurred upon a sudden quarrel or heat of passion. To the contrary, Monk and his cohorts stopped their car and got out of it when they saw Bell. There is no evidence that Bell did or said anything to entice them to stop and get out of the car. Rather, the evidence suggests that their conduct was deliberate; they were looking for trouble. They therefore stopped the car when they recognized Bell, a rival gang member. Monk, however, suggests that the argument between the rival gang members caused long-simmering tensions between the two gangs to suddenly erupt. Contrary to this suggestion, the fact that Bell and Monk were from rival gangs, and therefore they already had a tense relationship, undercuts any argument that the shooting resulted from a sudden quarrel or heat of passion. The “quarrel” between the rival gangs was not sudden.

Nor does the fact that Bell said “fuck” to Monk or to one of Monk’s friends provide sufficient evidence for an attempted voluntary manslaughter instruction. Such language, although certainly crude, is not the type of conduct that should have caused the

defendant to be aroused and also “would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.” (*People v. Manriquez, supra*, 37 Cal.4th at pp. 583-584.)

We therefore conclude that the trial court had no duty to instruct the jury on attempted voluntary manslaughter.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.